



STATE OF NEBRASKA  
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ATTORNEY GENERAL

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November 9, 2022

Via email at [REDACTED]  
Joe Dejka  
Education Writer  
Omaha World-Herald

RE: *File No. 22-R-157; Nebraska Department of Education; Joe Dejka, Omaha World-Herald, Petitioner*

Dear Mr. Dejka:

This letter is in response to your public record petition emailed to our office on October 25, 2022. You have requested our review as to whether the Nebraska Department of Education (“NDE”) and Commissioner of Education Matthew L. Blomstedt (“Commissioner”) complied with the Nebraska Public Records Statutes (“NPRS”)<sup>1</sup> with respect to your October 11, 2022, public records request for state assessment data. In accordance with our normal practice, on October 26 we forwarded a copy of your petition to the Commissioner and requested a response. We received the Commissioner’s response on behalf of the NDE on November 3. We note further that you supplemented your petition by email sent October 31. We have considered your petition and the NDE’s response in accordance with the provisions of the NPRS. Our findings in this matter are set out below.

**RELEVANT FACTS**

On October 11, you emailed a public record request to the Commissioner generally “seek[ing] to obtain the percent of students proficient in each subject and the participation rate (the percent of students who took the test) both statewide and in select districts for various grades and student demographic groups on the NSCAS 3-8 assessment and the junior year NSCAS ACT exam.” The NDE denied your request by letter dated October 17, indicating that the Commissioner did not have any records responsive to your request at that time but that the NDE was in the process of “drafting records that may be responsive to your request in the future.” NDE further asserted that “[s]ince they are

<sup>1</sup> Neb. Rev. Stat. §§ 84-712 to 84-712.09 (2014, Cum. Supp. 2022).

drafts and not records,” they were not subject to disclosure under § 84-712. NDE also indicated in its response that any finalized documents would be subject to withholding under the exceptions to disclosure in § 84-712.05(5) and (8).<sup>2</sup> You then challenged the NDE’s denial. The Commissioner subsequently clarified by letter dated October 24 that the NDE was in the process of drafting the assessment data and that there were no responsive records at that time, relying in this respect on Op. Att’y Gen. No. 91054 (June 17, 1991). He acknowledged that the statewide assessment data are public records, and that the assertion that the NDE would withhold the data under § 84-712.05(5) was made in error. The Commissioner further stated that the NDE “is committed to transparency,” and that “a copy of the student assessment data will be provided to you once it becomes final.”

### **YOUR PETITION**

You are challenging the NDE’s assertion that scores or proficiency levels could be considered “drafts.” You assert that while there may be ongoing internal discussions at the department about the wording of the discussion portion of the report or the online presentation, “the numbers are the numbers.” You further argue that “[t]he tests were taken last school year, and the department has possessed the results for more than four months. Again, there’s nothing draft about the numbers we requested.”

You also assert that the Attorney General opinion relied on by the NDE supports your position. You note that our opinion concluded that the records at issue must be disclosed since it was prepared in final form and had left the agency. You state that

[t]he World-Herald understands that the Nebraska Department of Education has already shared the assessment scores with school districts, some of whom subsequently shared results with teachers. That is strong evidence that the scores, like in 1991, were similarly prepared in final form within the agency and that the scores “left the agency,” as noted in the opinion.

In your October 31 email to this office, you indicate that it has come to your attention that schools have been providing test results to parents, which further “support[s] [your] contention that the scores were ‘prepared in final form within the agency, and they left the agency.’”

### **NDE’S RESPONSE**

The Commissioner informs us that the provisions of the Nebraska Quality Education Accountability Act, Neb. Rev. Stat. §§ 79-757 to 79-762 (2014, Cum. Supp. 2022) and the Elementary and Secondary Education Act, as amended by the Every

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<sup>2</sup> You indicate that after you challenged the NDE’s assertion of the personal information exception, officials informed you that the paragraph referencing § 84-712.05(8) had been erroneously included in the denial letter.

Student Succeeds Act, 20 U.S.C. § 6301 (2015), require the NDE to annually report assessment and accountability data for grades 3 through 8 and 11 for the 244 school districts in Nebraska encompassing 1,100 schools. Student reporting must be done using specified categories in those schools and districts. In addition, every school and district must be classified “for purposes of accountability.” The statutory deadline for this reporting is December 31. Neb. Rev. Stat. § 79-760.06 (Cum. Supp. 2022). The Commissioner indicates that the reporting is further constrained by the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g; 34 C.F.R. Part 99.

As indicated in the previous responses to you, the Commissioner indicates that “the NDE is still in development of these public reports” and will satisfy the public records requests while meeting the requirements prescribed by law. With respect to your claim that the data is a public record subject to disclosure because it has been shared with schools, parents and/or students, the Commissioner states that “NDE has only provided individually identifiable student data to schools under FERPA as part of a process that maintains protections for such data.” The validation and masking process is described by the Commissioner as follows:

The NDE also releases draft data to schools to verify and validate the data necessary to carry out the responsibilities under law for assessment and accountability reporting purposes. On October 3<sup>rd</sup> of this year, the Department released draft data to school districts that indicates that the data is not yet final nor available for public release and requests schools provide revisions or corrections. In this year, the time allotted was four weeks for schools to look for data errors, corrections, or omissions. The hundreds of thousands of data points makes this a substantial effort by a limited number of staff. Once data is verified and validated, the appropriate masking rules and requirements are necessary before student data is released so as to not inadvertently identify student records. This is especially challenging with low-enrollment schools, classrooms, student sub-groups, etc. For example, the necessity to mask data that might identify a student who is of one racial subgroup, in a given grade, with a given level of poverty, and identified for special needs, creates a unique challenge in ensuring that subgroup performance is appropriately addressed in the public reporting system.

It is the position of the NDE that at the time of your public records request, as well as the date of the Commissioner’s letter to the Attorney General, *public* records did not exist. The Commissioner reiterates that “the [NDE] will produce the record as part of the public records reporting system . . . .”

## **DISCUSSION**

As you know, § 84-712(1) of the NPRS generally allows Nebraska citizens and other interested persons the right to examine public records in the possession of public

agencies during normal agency business hours and to obtain copies of records in certain circumstances. "Public records" are defined as "all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing." Neb. Rev. Stat. § 84-712.01(1).

Op. Atty. Gen. No. 91054 involved a request from a state senator to the Governor's Policy Research Office ("GPRO") for a report relating to the Central Interstate Low-Level Radioactive Waste Compact. GPRO provided no materials in response to the request. The senator subsequently directed his request to Governor Nelson, seeking "access to reports, draft reports, or other forms of documents" purportedly prepared by the Department of Environmental Control ("DEC") relating to the potential liability to the state in the event the low-level radioactive facility site was not licensed. The governor did not specifically respond to the request, so the senator sought our review under § 84-712.03. The governor then requested our opinion as to whether the exceptions to disclosure in § 84-712.05(3) (trade secrets, other proprietary or commercial information) or subsection (4) (attorney work product) provided a basis to withhold the records "if the work involved is still in progress and if those materials may be used against the State in future litigation." *Id.* at 2.

To facilitate a resolution, this office requested and received the records at issue.<sup>3</sup> Upon examination, we concluded that § 84-712.05(3) and (4) did not apply. However, in response to the governor's "work in progress" inquiry, we articulated the following criteria to determine when materials prepared by public officials become "records and documents" subject to disclosure under § 84-712:

There is an obvious tension between a governmental agency's legitimate need to operate internally without interruption and intrusion on the one hand, and a legitimate concern that public documents might be hidden from view behind a "draft" label on the other. We believe that this tension should be resolved by determining what constitutes a record or a document under the Public Records Act on an individual, case-by-case basis. There may well be instances where certain materials are so embryonic that they do not constitute "records" or "documents" under the Act. For example, notes or drafts of documents prepared by lower level personnel within an agency which still remain subject to approval by upper management and which have not been issued by the agency. It seems to us that such preliminary materials do not constitute "records" or "documents" under the Public Records Act, and thus may be withheld from the public. In contrast, materials which have been through the formation process within the agency and which have left the agency are more obviously "records" or "documents" even

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<sup>3</sup> We note that although § 84-712.03 creates enforcement responsibilities for the Attorney General, there is no statutory mechanism for an *in camera* review of the documents by this office. Under § 84-712.03(2), that process is only available to district courts.

though procedures may require further approval before formal issuance. This latter category of documents, while arguably involving materials in a "draft" form, still constitutes "records" or "documents" subject to disclosure.

*Id.* at 3. We noted that the records provided by the governor included a typed document prepared by DEC with numerous handwritten notes and suggestions added by GPRO staff. We concluded that the "final official form" of the document had been jointly prepared and approved by DEC and GPRO, and that the work on the document had ended. Applying these standards to the records sought by the state senator, we concluded the typed materials were in final form and had left the agency and, consequently, constituted a record or document subject to disclosure under the NPRS. However, we also concluded that the handwritten notes and comments appended to the document by GPRO staff were not records or documents subject to disclosure since they had not been prepared in final form and had not left the agency. "In our view, they do not fit under the statutory definition of public record set out in § 84-712.01." *Id.* at 4.

The NDE represents that the student assessment data is in the process of being finalized and is not a public record at this time. You have taken the position that the test scores and proficiency levels are public records because they are in "final form" and have "left the agency." While there is no question that the data "left the agency," there is also no question that the data was not in final form on October 11 when you submitted your request. Similarly, it does not exist in final form today. According to the Commissioner, only individually identifiable student data was sent to school districts on October 3. NDE officials advised school districts that the data is neither final nor available for release, and requested that the districts review the data for revisions or corrections. Districts were given four weeks to conduct their reviews. We understand that NDE staff is now engaged in masking student data to ensure that individual students are not identified.<sup>4</sup> In our view, the state assessment data you have requested is not in final form and, as a result, is not subject to disclosure under § 84-712.

We find further support for our conclusion in *Phoenix Newspapers, Inc. v. Molera*, 200 Ariz. 457, 27 P.3d 814 (2001) [*Molera*]. In *Molera*, the Phoenix Newspapers, Inc. ("PNI") appealed a trial court decision denying it access to reports of student achievement test scores and underlying test results before the state board of education's press conference releasing the information. The trial court found that the department of education could deny access until the statutory release date (July 1), and because July 1 fell on a Saturday, to Monday, July 3. The trial court further found that the state "board was entitled to release the reports in an orderly manner at the time it chose on that date instead of being required to provide access earlier in the day to PNI." *Id.* at 459, 27 P.2d at 816. On appeal, PNI argued that the state board violated the Arizona public records

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<sup>4</sup> See *Data Access and Use Policy and Procedures Including Research and Evaluations*, rev. August 2013, available on the NDE's webpage [Data, Research, and Evaluation – Nebraska Department of Education](#).

law by denying PNI employees access to the records on the various dates and times requested prior to public release. In rejecting this argument, the court stated:

A.R.S. section 15–743(A) imposes on the board the task of compiling the achievement test score information and preparing reports pertaining to “every school and district and the state as a whole.” The board must submit the reports to the school districts and to the others specifically designated and also “make them available to the public.” The statute designates “July 1” as the time by which the board shall “publish and distribute the reports.” *Id.*

We find it clear from the statute that the board is responsible for providing complete and accurate reports of the test results. As to the reports, therefore, we agree with the superior court’s conclusion that the board had discretion to determine when it was finished with its drafting and editing process so as to have complete and accurate reports ready for public dissemination and to choose to release them to the public in an orderly manner within the time allowed by A.R.S. section 15–743(A) and any other applicable statutes or rules that might have extended the time.

*Id.* at 461, 27 P.2d at 818. Similarly, the NDE should be given discretion to complete its work on the student data to ensure accurate reporting, and to release those reports to the public in an orderly fashion prior to the statutory deadline of December 31.

Finally, for more than thirty years, this office, as well as numerous governmental agencies and officials, have relied on Op. Att’y Gen. No. 91054 as a basis to withhold records considered to be “drafts.” “Although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction.” *Capitol City Telephone, Inc. v. Nebraska Dep’t of Revenue*, 264 Neb. 515, 527, 650 N.W.2d 467, 477 (2002). “This is particularly so when the Legislature has failed to take any action to change such an interpretation.” *Id.* Since there has been no legislative action altering the conclusion reached in Op. Att’y Gen. No. 91054, this office will continue to rely on our opinion as a basis to exclude drafts of documents from disclosure under § 84-712.

## CONCLUSION

Based on the foregoing, we find that the student assessment data you requested on October 11 is not in final form. As discussed above, NDE staff are currently finalizing the data and will provide it to you when it is formally published in the upcoming weeks. In light of our conclusion, you have not been denied access to public records and NDE’s ultimate position with respect to the data was appropriate.

Joe Dejka  
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If you disagree with the conclusion reached in this disposition letter, you may wish to discuss this matter with your attorney to determine what, if any, additional remedies might be available to you under the Nebraska Public Records Statutes.

Sincerely,

DOUGLAS J. PETERSON  
Attorney General



Elizabeth O. Gau  
Assistant Attorney General

c: Matthew L. Blomstedt (via email only)

03-055-30